SPEECH

OF

HON. T. H. BAYLY, OF VIRGINIA,

ON

THE PROCEEDINGS OF THE EXECUTIVE

IN

CALIFORNIA AND NEW MEXICO.

DELIVERED

IN THE HOUSE OF REPRESENTATIVES, WEDNESDAY, JULY 17, 1850.

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SPEECH.

The House being in Committee of the Whole on the report of the Committee of Elections in the case of the application of H. N. SMITH to be admitted to a seat in the House as delegate from New Mexico—

Mr. BAYLY said:

Mr. CHAIRMAN: I had not designed to take part in this debate, until I heard the speech of the gentleman from Indiana, [Mr. McGAUGHEY.] He said that the question of the admission of the delegate from New Mexico was one of but little consequence to any one but himself; for that she had formed a constitution, and would shortly apply for admission, and would be admitted into the Union as a State. That gentleman, it is known, does not speak entirely without authority of the party with which he acts. Besides this, there are other indications, not to be mistaken, of the existence of the purpose to which he alludes. "Coming events cast their shadows before;" and it is certain that, ere the end of this Congress is reached, an effort will be made, by a powerful party in it, to bring New Mexico into this Union upon an equal footing with the other States; and, unless it be arrested by public opinion, it will be successful. I desire to meet it "*in limine*," upon the first occasion when it is supported here from a respectable quarter; and I venture to say that, if it shall be consummated, it will be one of the grossest outrages, and most flagrant violations of the constitution, which have ever been perpetrated. But before I proceed to establish this, I desire to say a word or two in relation to the course which the party in power has pursued with respect to our Territories. I shall say no more of it in California than is necessary to illustrate my argument concerning New Mexico; for it has been so thoroughly discussed already, that I am sure I should be listened to with very little patience if I were to attempt to go over the whole ground again.

Sir, from the close of the last session of Congress to this time, not one step has been taken by the administration with respect to California and New Mexico in which the constitution and laws have not been trampled under foot. Its course has greatly added to and complicated the embarrassments and difficulties by which we are surrounded. It has been the prolific fountain which has swelled the bitter waters that are spreading through the land. But the party necessity for the course which has been pursued had its origin prior to the time to which I refer. It originated in the course which the Whig party saw fit to pursue in the presidential canvass of 1848. In that canvass the subject of slavery in the Territories, and the course which should be taken upon it, was the all-absorbing issue. Yet the Whig party ran a candidate who refused to make a declaration of his opinions concerning it; who was held up at the North as the friend of the Wilmot proviso, and at the South as its most reliable opponent. He was voted for in the two sections under the influence of these inconsistent representations of his opinions. He was elected, and went into office under diverse expectations by his friends of the course he would pursue. Under these circumstances, it was evident, if he was

ever brought to act directly upon the subject, that one section or the other would be grievously disappointed, and a fatal party rupture would ensue. To avoid this, it was necessary that some plan should be hit upon by which the issue could be evaded; and that plan was found in the scheme to induce the inhabitants of the Territories to form constitutions containing a slavery prohibition, and apply for admission into the Union as States. It is true that, at the last session of Congress, a gentleman, now a member of the cabinet, [Mr. Preston,] proposed a bill providing for the admission of our Territories acquired from Mexico as a State; that the Wilmot proviso was put upon it; and it was thus made identical in substance with the present constitution of California; and that in this shape it did not receive a solitary vote in the House of Representatives! It was unanimously condemned by Congress, to whom it is conceded the power of organizing governments for our Territories in the first instance belongs. But what did that weigh with men more intent upon extricating themselves than their country from difficulties? They saw no other escape than the plan they proposed. They supposed, by the exercise of executive patronage, by the outcry they could raise about the dereliction of duty on the part of Congress in not providing governments for the Territories, and the necessity for them, and, above all, by the sympathy of the North elicited for the provision excluding slavery, that they could carry their scheme through, and thus evade the issue of the Wilmot proviso. It was well understood in California, and an effort was made to resist it; but the administration proved too strong.*

"Mr. SEMPLE, (president of the convention.) I feel under some obligation to repeat a conversation which has a direct bearing upon this matter. There is a distinguished member of Congress, who holds his seat from one of the States of the Union, now in California. With a ire to obtain all the information possible in relation to the state of things on the other side of mountains, I asked him what was the desire of the people in Congress? I observed to him was not the desire of the people of California to take a larger boundary than the Sierra , and that we would prefer not embracing within our limits this desert waste to the east. was, 'For God's sake, leave us no territory to legislate upon in Congress.' He went then that *the great object in our formation of a State government was to avoid further legis-* would be no question as to our admission by adopting this course; and that all inor importance could afterwards be settled. I think it my duty to impart this he convention. The conversation took place between Mr. Thomas Butler King *Debates*, 184.)

communication, Mr. Shannon says, (*Debates*, 191:)

nt which has been urged in favor of the extreme boundary has been, not the convenience, not the benefit to be derived from it, nor the necessity robability of its passing the Congress of the United States, and the from Congress that if such a proposition was adopted it would pass. of the new State of California that all dictation of this kind should reception in this house; that we should not listen to the proposi- ter, however high their characters at home, who shall come here ntlemen, pass such and such boundaries for the State of Califor- e to pass through Congress and become a sovereign and inde- so, there is danger at hand: *you cannot pass.* Sir, this is not *nt.* * * * But who are these authorities? Are they service in this country, so deeply interested in the welfare State is alone the dearest object of their aspirations? Or d parties, not of Congress? For they do not speak the ak the will of Congress. And when the president of xpression of Mr. Thomas Butler King—'For God's e about'—when he (Mr. King) spoke it, I presume Congress of the United States. *The secret of it is themselves in difficulty upon this question; they are homas Butler King (it may be others) is sent here, ple of California to establish a State government,*

Speaking of this

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As soon as the scheme of the administration was determined upon, the sanctity of this hall was invaded ; the constitution of the United States and the laws of one of the States of this confederacy were violated, in selecting the agent to carry it out. The constitution of the United States declares that "no person holding any office under the United States shall be a member of either house during his continuance in office." Now, sir, the object of this provision of the constitution is very evident. By the constitution the appointment of all officers of the United States, except some inferior ones, is conferred on the President; and it was to exempt the legislative department from the control of the Executive that the provision was designed. The penalty for uniting an executive with the legislative office is the forfeiture of the latter, which the framers of the constitution, who so highly prized the honor of being a representative of the people, supposed was the severest penalty which the case admitted of. The laws of Georgia declare, in the most explicit terms, "that no person shall be elected a representative in Congress who has not been an inhabitant of this State three years next preceding his election, and paid his tax regularly during that time; *nor shall he hold any office of profit under this State or the United States during the time for which he may be elected a representative.*" And they require these members of Congress, within twenty days from their election, to accept or decline the office of representative, and provide for a new election in the event of their failing to do so. T Butler King had accepted the office of a representative of the State of Georgia; had become a member of the House of Representatives, and enjoyed all of its privileges—the franking privilege, the exemption from militia duty, and from arrest in coming to the seat of government. Notwithstanding, he was despatched by the Executive to California, under the pay of the government. Why was he selected for that mission in preference to tens of thousands of others as well qualified, who could have been sent upon it without the violation of the laws to which I have referred? He was selected because he was a member of Congress, and especially because he was a member from a southern State. The transaction itself makes this perfectly evident. The object of the administration was to avoid the issue of the Wilmot proviso. The ready mode to do this, it was thought, was to induce the people of California to adopt a State constitution, and apply for admission into the Union. But it was not without its difficulties. There was no law to authorize it; and to convene a convention under military authority, by which the mode of electing its members and the qualification of voters was prescribed, was extremely irregular, and at war with the spirit of our free institutions, and, it was to have been anticipated, would be resisted by Congress, by whom these prerogatives had heretofore been exercised. And then, if they formed a constitution without a clause prohibiting slavery, it was known that the North would either resist her admission and insist upon a territorial government with the Wilmot proviso, or do as they had done

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*and, in the next place, to include the entire territory. * * * Let the President and his cabinet shoulder their own difficulties." * * **

"It is true, sir, that the boundary is enormous. No man here wishes to include the whole of it. We are told by these very gentlemen that it is too large; it is unwieldy; it includes an enormous barren tract of country—an immense desert waste; but, say they, *we will bring it all in, not for the purpose of retaining it within the State of California, but for the purpose of settling the slave question at home.*"

in the case of Mr. Preston's bill—ingraft it on the State constitution, and thus compel the Executive, in either event, to meet the issue. And, on the other hand, it was supposed that if they excluded slavery, they would meet with difficulties at the South, who would thereby be as effectually excluded from the Territories as by the Wilmot proviso.* In this dilemma, a member of Congress from a southern State, if he was willing to do so, could co-operate most effectually with the Executive. As a member of Congress of long standing, and who could speak with some show of authority, he could do much to remove apprehensions on the first point; and as a southern member also, he could do much to remove them on the last, and thus secure the adoption of a constitution acceptable to the northern majority, by whom California would at once be admitted as a State. By this scheme the issue of the Wilmot proviso would be evaded, and, although the South would be as effectually excluded from the territory as if the proviso had been applied, it was hoped her people could be quieted by being told that what had been done was the result of her own doctrine of non-intervention, and the right of the people upon whom they were to operate to frame for themselves their own institutions. But that doctrine precludes the intervention of any authority of the Executive even more emphatically than of Congress; and that right is a mockery, if it be exercised under constraint of any kind.

But other causes, besides the anxiety of the people of California for a government, which had been refused them by those now professing to be their especial friends because it was not coupled with the unconstitutional proviso, powerfully contributed to the result which we now have in her constitution; the most prominent of which is, the state of society there. The slaveholder being kept out of California by the threat of the Wilmot proviso, which has been constantly held over him, most of her population are men without capital, who have been enticed there by the prospect of sudden gain. Few have gone there with the view of a permanent residence: on the contrary, most of them with the hope of speedily getting riches and returning to the Atlantic shore to enjoy them. But little land is appropriated in the gold region; and the business of mining has not assumed the character of a regular pursuit, to be carried on systematically and by the organization of capital and labor. On the contrary, to use a homely but expressive phrase, every man is working "on his own hook." In this condition of things, the fewer competitors they have the better for them. Such a people, under such circumstances, would of course exclude slaves, however desirable they might be to them under other circumstances. It is for the same reason that the people of California are now attempting to expel foreigners, that they excluded slaves. They are not seized with a sudden fit of native-Americanism; but foreigners and negroes are the only classes they can expel with even a show of

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*In the California convention Mr. Shannon said:

"When this proposition comes before them, southern members—those from the slaveholding States—will see that it strikes from beneath their feet an enormous tract of country into which they desire to introduce slavery hereafter. Add to that the further argument of the enormously extensive territory that it includes; and then add to that the further argument, that a large portion of that territory has not been represented in this body—that the feelings and wishes of the population are not known—and I think you leave open ground enough for them to build an argument upon that will defeat your constitution; that you at least bring all those difficulties which gentlemen hope to avoid directly to bear against it—a result which every gentleman here, I have no doubt, honestly seeks to avoid. These are arguments which you cannot get over."

authority, and they expel them that they may have, as near as possible, a monopoly of the mines. But for this, in California, as in every other new country where labor is scarce and dear, emigration would be encouraged.

I know it is constantly said that California is not suited to slave labor, and that under no circumstances would it have gone there. Such is not my opinion, and never has been. In its climate and pursuits it is admirably suited to African slavery. It is warmer than that of eastern Virginia; and there is no pursuit in which slave labor can be so well employed as in mining, especially of the precious metals. One of the difficulties of employing slave labor in agriculture is the inefficiency of it in the absence of supervision, and the difficulty of proper supervision where the slaves are dispersed. But in mining operations they are, to a large extent, embodied, and the same superintendence which is requisite with any kind of labor is quite sufficient for them. Where a white man is employed in mining the precious metals, if he come across a valuable deposite, he can make away with it without difficulty. But in all slave States, every one is prohibited from dealing with slaves in articles which can only belong to his employer. I have no doubt, therefore, that, but for the law prohibiting it, slaves would be carried to California as soon as mining there should become a systematic pursuit.* The only difficulty is one which is not properly

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*These views are strongly corroborated by what Mr. McCarver and Mr. McDougal said in the California convention:

"Mr. McCarver then moved the following section:

"39. The legislature shall, at its first session, pass such laws as will effectually prohibit free persons of color from immigrating to and settling in this State, and to effectually prevent the owners of slaves from bringing them into this State for the purpose of setting them free."

"Mr. McCarver. This is the article which I offered to the House some time ago. I withdrew it at the suggestion of several gentlemen who thought it would be more appropriate in another part of the constitution.

"I have no doubt, sir, that every member of this house is aware of the dangerous position in which this country is placed, owing to the inducements existing here for slaveholders to bring their slaves to California and set them free. I am myself acquainted with a number of individuals who, I am informed, are now preparing to bring their slaves here upon indentures and set them free. I hold it to be a correct doctrine, sir, that every State has a right to protect itself against an evil so enormous as this."

Again, the same gentleman, page 38:

"Let us look at the inducements, and see whether these fears are without foundation; let us see what is the probable value of an able-bodied negro man in the southern States. They hire there at from sixty to one hundred dollars a year. Suppose you pay seven hundred dollars to get a slave here, and set him free on condition that he shall serve you for one year. He produces, according to the ordinary rates in the mines, from two to six thousand dollars. There are many of our southern friends who would be glad to set their negroes free and bring them here, if they produced one-half that amount. When the terms of the contract have expired, what would these slave do? And I can assure you, sir, thousands will be introduced into this country before long, if you do not insert a positive prohibition against them in your constitution—an immense and overwhelming population of negroes, who have never been freemen, who have never been accustomed to provide for themselves."

And in like terms, page 180, Mr. McDougal:

"Gentlemen have risen on this floor and stated that they had received letters from the South; and that they knew of many others who want to bring their slaves here, and work them for a short period in the mines and then emancipate them. If this constitution is thrown back upon us for reconsideration, it leaves them the opportunity of bringing their slaves here. It is what they desire to do: to create some strongly objectionable feature in the constitution, in order that they may bring their slaves here and work them three months. They will even then get more than they can get for them in the States. I look upon that as the result if we send our constitution to Congress with a boundary so objectionable as this."

appreciated—the inadequacy at this time of the supply of them. They are all now profitably employed; the demand for them exceeds the supply, and consequently a large number of them could not be removed from any of our southern States without creating a deficiency of labor, and augmenting its price. This difficulty is rapidly disappearing under the natural increase of that species of population, which, in a short time, will require new fields of employment to secure the comfort of both the black man and the white.

Mr. Chairman, the constitution of the United States was violated by the administration in other respects in its proceedings in California. The constitution declares that "no money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time." Yet, without any appropriation by law, the salary of Mr. King was paid him from the public treasury, as was also the per diem and other expenses of the California convention. And, notwithstanding the last sentence of the clause of the constitution which I have just quoted, I have been unable to ascertain what amount of expenditure was incurred on these two accounts; nor can I ascertain out of what particular funds they were paid. But this last point, in the view I am taking, is not important, as it makes no difference out of what funds they were paid, as it is perfectly certain that there were no funds appropriated for any such purpose, and none which legally could be so applied.

This series of audacious outrages perpetrated by the administration have greatly complicated the difficulties growing out of the slavery agitation, and have greatly exasperated the southern people. I know it is said that what has been done is now irremediable, and that all now left to us is to make the best we can of it. To a considerable extent I know this is true; but, so far from its reconciling us to what has been done, the very conviction that such wrong should be successful but adds to the feeling of irritation and discontent, if, indeed, it has not awakened one of a more decided character.

But, sir, as flagitious as these proceedings have been in respect to California, they are propriety itself in comparison with what has been done and proposed in respect to New Mexico. Not only has a military government been continued there without authority of law, but the Executive has recommended to Congress to abstain from organizing a territorial government, and leave the country under military rule until it is ready to apply for admission into the Union as a State. And this recommendation is made to us by those advocates of the right of the people to choose for themselves their form of government, notwithstanding the people of New Mexico, in convention assembled, had, at the time of this recommendation, expressed their decided preference for a territorial government in the usual form, and had petitioned Congress to extend one over them. And, strange to say, this monstrous recommendation has met with advocates on this floor, and in gentlemen, too, who denounced President Polk as a tyrant and usurper for authorizing the establishment of temporary civil governments in time of war.

Sir, I shall never forget the fury with which President Polk, and all who defended him, were assailed upon this floor at the time I allude to. There was no epithet so harsh that it was not applied. He was charged with having usurped the powers of Congress in establishing temporary

governments in Mexico. It was admitted that humanity required that civil governments, adequate to protect persons and property, should be established; but it was contended that this could only be done by Congress. To that body, it was argued, belonged the power, exclusively, to declare war and "to make rules concerning captures on land or water." On that occasion I undertook to defend the President; but did I or he take the ground that he had the power to establish or continue those governments one moment after the war had ended? On the contrary, the establishment of those "*quasi*" civil governments—civil in their forms and rules of proceedings, but military in their origin—was defended as *a war measure*. We admitted that Congress had the exclusive right to declare war; but we maintained that to the President, as commander-in-chief of the army and navy, belonged the duty to wage it. We admitted that Congress possessed the power to make rules concerning captures by land and by water; but we maintained, if they declared war without doing so, that, in the language of the Supreme Court, "in such cases the general laws of war applied;" and we showed that by those laws it was not only the right but the duty of the President of the United States, not as the civil executive, but as commander-in-chief of our forces, to establish "*quasi*" civil governments to protect the vanquished during our military occupation of the country. In support of this view, we referred to cases in our own history—particularly to the occasion, in the late war with Great Britain, of our taking Upper Canada, upon which General Harrison, acting under the instructions of Mr. Madison, so profoundly versed in national law, established temporary civil governments. When he did so, he only substituted a milder for a more rigorous law—civil for martial law. But we utterly denied the power of the President to continue those governments one day after the war ceased, or the territory in which they existed became, either by treaty or otherwise, completely our own. To have claimed for him any such power, would have involved the claim of power in the President to proclaim martial law in time of peace within the jurisdiction of our laws. Yet, notwithstanding this disclaimer, we were denounced as monarchists, and as claiming for the President more than regal powers.

If these military governments had been continued as governments *de facto*, and merely for the purpose of preserving good order, and under instructions not to interfere with civil affairs, so as to change the *status* of them, I should have been the last to complain. The necessity of the case would have excused it. But they have gone greatly beyond this. Those military officers have actively participated in civil affairs, and exercised sovereign functions. They have undertaken to convene conventions of the people to frame constitutions, to district the territories, and to fix the qualification of voters. While we, the representatives of the people, are engaged upon the very subject of the government of our Territories, it is snatched from our hands by an officer of the army, acting under the instructions of the Executive. The gordian knot, which we are exhausting our ingenuity to untie, is suddenly cut by the sword of a lieutenant colonel of the army! In the better days of the republic, what, sir, would have been said of such transactions as these? Under such auspices a constitution has been formed in New Mexico, and is at this moment in this city. It would be a useless consumption of time to undertake to describe its character. The influences which stamped the

character of the constitution of California have operated in New Mexico. And we are told that, during this Congress, New Mexico is to be admitted as a State into this Union. Such a proceeding is so violative of every principle of propriety, and of the constitution of the United States, that I desire to expose it at once in all of its deformity.

The constitution of the United States provides that "new States may be admitted by the Congress into this Union; *but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of Congress.*" My friend from North Carolina [Mr. ASHE] on yesterday read this clause of the constitution; and, to bring the case of New Mexico within it, he undertook to show that the boundaries of Texas unquestionably extended to the Rio Grande, from its mouth to its source. My own opinion is, that the weight of the argument is decidedly with him; and, if it be so, there is an end of the matter. But I shall not go into it now, for it is not necessary for my purpose. If any part of the territory included within the proposed boundaries of New Mexico is under the jurisdiction of Texas, whether by perfect title or not I do not care, you cannot admit her as a State without violating the provision of the constitution which I have quoted. This will be made manifest by the history of it.

To comprehend it fully, we must revert to the mischief against which it was designed to provide. Under the articles of confederation, few subjects gave rise to greater embarrassment in Congress than the claim of Vermont to be admitted into the confederacy as an independent State. She was within the limits claimed by New York; but she had successfully resisted the authority of that State, and set up for herself as an independent community. She had extended her encroachments beyond the bounds originally claimed by her into those of both New Hampshire and New York. She claimed admission into the confederacy as an independent State. Her pretensions were favored principally by the New England States, (New Hampshire excepted,) and by Maryland, New Jersey, Delaware, and Rhode Island. They were opposed by New York, Virginia, North Carolina, South Carolina, and Georgia. New Hampshire acted with these States until Vermont had contracted her boundaries to the Connecticut river; and Pennsylvania favored Vermont until a similar difficulty arose in her own limits, when her position was changed.

Mr. Madison describes the influences which operated on those who favored, and those who opposed, Vermont's admission. It was patronized, he says, "1st, from ancient prejudice against New York; 2d, the interest which the citizens of the New England States had in the lands granted by Vermont; 3d, but principally from the accession of weight they would derive from it in Congress." It was opposed by other States than New York, the ground of whose opposition is obvious enough without recital, from, "1st, an habitual jealousy of a predominance of eastern interest; 2d, the opposition expected from Vermont to western claims; 3d, the inexpediency of admitting so unimportant a State to an equal vote in deciding on peace, and all the other grand interests of the Union; 4th, the influence of the example on a premature dismemberment of the other States."

The 2d, 3d, and 4th, Mr. Madison said, ought to be decisive with Virginia; and they were.

Now, sir, before I go further, I desire to pause here, to call the attention of the committee to the similarity between the influences which existed in the case of Vermont and those which exist now, and against the domination of which the provision of the constitution under consideration was designed to provide. Then there was the prejudice against New York—now against Texas; then the interest of some of the people of New England in lands in Vermont—now a similar interest, it is supposed, in the proceeds of those which are to be rescued from Texas; then, *principally*, Mr. Madison tells us, from the accession of weight the admission of Vermont would give the North - now, *principally*, as none will dispute, the same consideration. So, on the other hand, the grounds of opposition were very similar.

Besides this difficulty about Vermont, which had actually occurred, there were others very analogous to it which were anticipated, at the time of the formation of the constitution. Kentucky had already manifested a disposition to separate from Virginia. Tennessee had actually done so from North Carolina, and set up a separate government, under the name of Frankland. A similar difficulty was anticipated, which afterwards actually occurred, between Georgia and the settlers on her western territory, now Alabama and Mississippi. And also a similar one between Maine and Massachusetts. Besides these cases, the people of western Pennsylvania, numbering near two thousand, residing in the disputed territory between that State and Virginia, had sent a long petition to the Continental Congress, "complaining of the grievances to which their distance from public authority exposed them, and particularly of a late law of Pennsylvania, interdicting even consultations about a new State within its limits; and praying that Congress would give a sanction to their independence, and admit them into the Union."

From this historical narrative, we ascertain the mischief intended to be provided against. And it was so manifest, that, in nearly every proposition submitted in the convention, contemplating the admission of new States, a remedy was proposed; or, in other words, in nearly all of them, a restriction was imposed upon Congress, in the admission of new States, extending to all cases of disputes as to the regularity of the formation of the new State.

The first resolution moved on this subject was a part of the Virginia proposition, drawn by Mr. Madison, but submitted by Governor Randolph, on the first day of the convention. It was in these words:

"*Resolved*, That provision ought to be made for the admission of States *lawfully arising within the limits of the United States*, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices less than the whole."

The resolution, as proposed by Governor Randolph, was adopted by the convention, and, together with others, proposed by Mr. Pinckney, of South Carolina, and Mr. Patterson, of New Jersey, was referred to the Committee on Detail, charged with the duty of preparing the draught of the constitution. That committee reported a substitute for the resolution of Governor Randolph, which contained the provision, among others, that, "if new States shall arise within the limits of any of the present States, the consent of the legislature of such State shall be necessary to its admission." The provision underwent various modifications, until it assumed the shape in which we now find it in the constitution. While it was under discussion, Luther Martin violently opposed all but the first sentence of it.

"Nothing (he said) would so alarm the limited States as to make the consent of the large States *claiming* the western lands necessary to the establishment of new States within their limits. It is proposed to guaranty the States. Shall Vermont be reduced by force in favor of the States *claiming* it? Frankland and the western country of Virginia were in the same situation." Again: he (Mr. L. Martin) "urged the unreasonableness of forcing and guarantying the people of Virginia beyond the mountains, the western people of North Carolina and Georgia, and the people of Maine, to continue under the States now governing them." To obviate his objections, he moved the following substitute: "The legislature of the United States shall have power to erect new States within, as well as without, *the territory* CLAIMED by the several States, or either of them, and admit the same into the Union: *Provided*, That nothing in this constitution shall be construed to affect the claim of the United States to vacant lands ceded to them by the late treaty of peace."

In support of the original proposition, Mr. Butler said: "If new States were to be erected, without the consent of the dismembered States, nothing but confusion would ensue. Whenever taxes should press upon the people, demagogues would set up schemes of new States."

Doctor Johnson was "afraid that, as the clause stood, Vermont would be subjected to New York, contrary to the faith of Congess."

Mr. Wilson: "When the majority of a State wish to divide, they can do so. The aim of those in opposition to the article, he perceived, was that the general government should *abet* the minority, and by that means divide a State against its own consent."

In favor of Mr. Martin's substitute, only New Jersey, Delaware, and Maryland voted; and the provision as it now stands in the constitution was agreed to.

We thus see that there was perfect accord between the friends and opponents of this clause of the constituton as to the effect it would produce. It was agreed on all hands that it would prevent Congress from admitting a new State, which should arise in territory situated as the western territory of several of the States was at that time, without the consent of the State concerned. For illustration, let us suppose a case which might have arisen in the northwestern territory, if Virginia had not ceded it to the United States. Virginia claimed it as part of her territory, although she had never actually extended her jurisdiction over it. But her title was disputed by the other States. They said that, although it was within the limits she claimed under her charter, yet she had not actual occupancy of it; that it was in the occupancy of hostile Indians; that it had been acquired from France by Great Britain in the treaty of 1763; that it had been rescued from Great Britain by the common efforts of all of the colonies, who by their conquest had succeded to her rights, and that therefore it ought to belong to all. Now, suppose this dispute had not been ended by the Virginia deed of cession, and the inhabitants of the territory had met and formed a constitution and applied for admission into the Union: will any one say that Congress could have decided the case in favor of the United States by their admission? Was it not precisely such a case against which the provision under consideration was designed to provide?

But, sir, I take higher ground. I not only contend that the provision under consideration was intended to apply to cases were there was a dispute, but that it was only to such it was designed to apply. The idea

that Congress could dismember a State without its consent, by admitting a portion of its people, who should meet within its known and recognised limits and form a constitution, into the Union as a new State, would have been at war with every notion of government prevalent at the time, and never would have entered the head of the wise men who favored the constitution. If a portion of the people of a State, within its undisputed jurisdiction, should meet, without authority from the existing government, to form a constitution, preparatory to admission into the Union as a new State, it would be a case of domestic violence, for the suppression of which another provision of the constitution would provide. The provision to which I allude is the fourth section of the fourth article of the constitution, the one to which Mr. Martin referred, and which is in these words: "The United States shall guaranty to every State in this Union a republican form of government, and shall protect each of them against invasion, *and, on application of the legislature, or of the executive, when the legislature cannot be convened, against domestic violence.*"

We have thus seen the history of the restriction upon Congress in admitting new States. Now, sir, let us apply to it Mr. Jefferson's rule of construction in such cases: "On every question of construction, (said he,) carry ourselves back to the time when the constitution was adopted, recollect the spirit manifested in the debates, and, instead of trying what meaning may be squeezed out of the text or invented against it, conform to the probable one in which it was passed." Do this, and can there be a doubt left on the mind of any one as to the true construction of the provision of the constitution respecting the admission of new States? The restriction in it was most clearly designed for a case of disputed jurisdiction; and the purpose of its framers was, in such a case, to prevent Congress, which was so likely to be actuated by sectional or political views, from *abetting* (to quote the expression used in the convention) the new State by her admission into the Union without the consent of the State concerned.

Now, let us apply these principles to the case of New Mexico. Two-thirds of her territory and people are within the limits claimed by Texas in her constitution; she has passed, years ago, solemn acts extending her constitution and laws over it; to a large portion of the territory included in the limits claimed by New Mexico she has actually extended her jurisdiction, by organizing her counties, establishing her courts, and administering justice in them, without opposition from any one. Now, sir, if New Mexico, under these circumstances, is admitted, will not Texas be ousted of her jurisdiction, and curtailed in her limits, in flagrant violation of the provision of the constitution which I am considering, and also the clause which declares that "nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular State?"

But it is said the admission of New Mexico as a State would not prejudice the claim of Texas—that, after her admission, the case could be carried before the Supreme Court, where the question of boundary would be impartially settled.

Sir, I utterly deny the jurisdiction of the Supreme Court in any such case. I deny that the constitution confers upon the judiciary "any political power whatever." But a question of boundary between States is one affecting their sovereignty in a most vital particular, and is eminently

of a political character. The judicial power of the United States originally extended to "cases in law and equity arising under the constitution and the laws of the United States; treaties made or which shall be made under their authority; to all cases affecting ambassadors or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States is a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State and a citizen thereof and foreign States, citizens, or subjects."

The eleventh amendment of the constitution declares that "the judicial power of the United States shall not be construed to extend to *any suit in law or equity* commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

The words "cases in law and equity" and "controversies," employed in the second section of the third article of the constitution, are used as synonymous. This is shown by the second clause of the second section, and also by the amendment just referred to. The second clause is in these words: "In all cases affecting ambassadors and other public ministers and consuls, and *those in which a State shall be a party*, the Supreme Court shall have original jurisdiction. *In all the other cases before mentioned*, the Supreme Court shall have appellate jurisdiction, both as to law and fact," &c. Here we see that the constitution, as it originally stood, giving the Supreme Court jurisdiction "between a State and citizens of another State," used the word "controversies;" but that in the amendment repealing it, they used the words "any suit in law or equity." And so in the second clause of the second section of article third, the language is: "In all *cases* affecting ambassadors and other public ministers and consuls, *and those in which a State shall be a party*, the Supreme Court shall have original jurisdiction." And in the provision giving the federal courts jurisdiction in suits "between citizens of different States," the term "controversies" is used.

But I prefer to employ the comments of Chief Justice Marshall upon this point to any of my own. In his celebrated speech in the case of Jonathan Robbins, he said:

"By the constitution, the judicial power of the United States is extended to all cases *in law and equity* arising under the constitution, laws, and treaties of the United States; but the resolutions declare the judicial power to extend to *all questions* arising under the constitution, treaties, and laws of the United States. The difference between the constitution and the resolutions was material and apparent. *A case in law or equity was a term well understood, and of limited signification.* It was a controversy between *parties*, which had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution, it would involve almost every subject proper for legislative discussion and decision; if to every question under the laws and treaties of the United States, it would involve almost every subject on which the Executive could act. *The division of power which the gentleman had stated could exist no longer, and the other departments would be swallowed up by the judiciary.*"

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"By extending the judicial power to *all cases in law and equity*, the constitution had never been understood to confer on the department ANY POLITICAL POWER WHATEVER. To come within this description, a question must assume a *legal form for forensic litigation and judicial decision.* There must be *parties to come into court, who can be reached by its process and bound by its power;* whose rights admit of *ultimate decision* by a tribunal to which they are bound to submit."

"A case in law or equity proper for judicial decision may arise under a treaty, where the rights of individuals, acquired or secured by a treaty, are to be asserted or defended in court—

as under the fourth or sixth article of the treaty of peace with Great Britain, or under those articles of our late treaties with France, Russia, and other nations, which secure to the subjects of those nations their property within the *United States;* or, as would be an article which, instead of stipulating to deliver up an offender, should stipulate his punishment, provided the case was punishable by the laws and in the courts of the United States. But the judicial power cannot extend to *political compacts—as the establishment of the boundary line between the American and British dominions;* the case of the late guarantee in our treaty with France; or the case of the delivery of a murderer under the twenty-seventh article of our present treaty with Great Britain."

Now, it is perfectly evident, from the language of the constitution, and from the history of it, that "the cases in law and equity" and "the controversies" to which the judicial power of the United States extends are those involving questions of "*meum and tuum*"—such as are the usual subjects of forensic litigation. It most certainly does not refer to all controversies, of no matter what character, between the parties enumerated. Take two cases for illustration—and very many others could be added: A few years ago, a controversy existed between New York and Virginia, arising under the constitution and laws of the United States. The governor of Virginia made a demand upon the governor of New York for the surrender of three fugitives from justice. The governor of New York refused to comply, and assigned reasons for his refusal, which were considered by Virginia of the most alarming import. The governor of each State was backed by the legislature of their respective States, and thus the controversy became emphatically one between two States; and it was a very angry one. Now, will any one say that such a case as that could be tried in the Supreme Court? How could the parties be brought into court? In such a case, how could the judgment of the court be enforced? Again: the judicial power of the United States extends to controversies between a State and foreign States, and to controversies "to which the United States shall be a party." There were questions of boundary between Maine and Great Britain, and between Texas and Mexico. Will any one say the Supreme Court could take jurisdiction of such a question, even if the foreign State should be willing to trust it to our courts?

The constitution did not design to confer upon the Supreme Court jurisdiction of any other questions than such as are the usual subjects of forensic litigation. So far from its being the purpose of the constitution to confer upon any one of the three departments of our government powers greater than usually belong to them in other constitutional governments, it is most manifest that the purpose was greatly to restrict them. But questions of boundary *between States* have always been considered political, and not judicial. Such a construction as would give the Supreme Court jurisdiction in the case under consideration would, in the language of Judge Marshall, "swallow up by the judiciary the other departments."

Let us test the question of the jurisdiction of the Supreme Court in the case of the Texan boundary by the principles I have laid down.

First, as to *the process*. What judicial process will reach a State? There is none. Congress frequently has been called upon to provide it, but it has refused. Upon whom will you serve the ordinary process? Upon the governor? He is not the State. Upon the attorney general? Why upon him? Upon the legislature? How would you do it? Not being able to serve the process to commence the suit, would you proceed against the State to outlawry? In the cases between States which have been decided heretofore by the Supreme Court, both parties voluntarily appeared. It

is true, consent cannot give jurisdiction; but process may be waived. But suppose this difficulty overcome, and Texas should refuse to answer: how could you compel her? Would you issue an attachment, and imprison her for contempt? Upon whom would you serve your attachment, and whom would you imprison? Would you proceed against her by default? Where is the statute to authorize you to do so? But suppose the parties should appear: then the question of jurisdiction arises.

The first thing to be decided in questions of jurisdiction is as to the character of the parties. You must ascertain if the parties are such as can litigate in the forum before you inquire as to the nature of the question. No matter what may be the nature of the question, the parties must be such as can come and be brought into court, and, when there are but two of them, will remain on the record to the end of the cause, and can be bound by its judgment. This obligation must be mutual. Now, what parties are there to this question of boundary who can sue or be sued? In the first place, I deny that the United States has any controversy, technically speaking, with Texas. If there be such a one, I demand to know when it arose, and who made it. The President cannot make a legal controversy for the United States, nor can a member of this House or of the other do it. It can be done only by *the government*, and not by one department of it. Now, sir, when or where has *the government* made any controversy with Texas as to her boundary? It had one in behalf of Texas with Mexico; but that is settled, and there is an end of it. But when and where has it made one for itself? The President has most illegally attempted to do so; but he has not yet become "the State," as a French monarch claimed to be, although I admit his pretensions are rapidly leading that way. If the United States be not a party, is New Mexico? Sir, there is no such political being. She expired when she was conquered by our arms, and annexed to our territory by the treaty. Whatever doubt there may be as to the existence of Mexican municipal law in the territories we acquired from her, there can be no doubt that her political law has expired.

But it is said, if we admit her as a State, she becomes revived, and that then she would be a party capable of litigating with Texas. I have already shown that she cannot be admitted, pending the dispute with Texas, without the consent of Texas. But suppose I am wrong in this: still, considering the character of the controversy, New Mexico would not be such a party to it as the court could recognise. A party to a controversy, to be a proper one on the record, must be such a one as will continue on it to the end of the cause, survive the final decision, and be bound by it. But if the court should decide against New Mexico, it would annihilate the party, deprive itself of jurisdiction in the very act of deciding the case upon its merits, and be incapable of pronouncing a judicial decision upon the question it undertook to try. Parties sometimes prove themselves out of court; but here the court would determine it had no case before it in the very act of deciding it. It may be said, however, that a part of New Mexico is not even claimed by Texas, and that that portion would still constitute the State. Very little of New Mexico capable of habitation by civilized man lies west of the Rio Grande. The portion of New Mexico west of that river has no white population. Its entire population consists of about ten thousand Pueblo Indians. The idea of such a country as that constituting a State of this Union is abso-

lutely ludicrous. Besides, as I shall show directly, there is nobody there who has the constitutional qualification of a senator or representative.

These remarks may be applied, also, to some extent, to the other party. It is contended that the United States, by the treaty, succeeded to all the claims of Mexico. Now, it is known that Mexico claimed the whole of Texas up to the Sabine; and it was this claim she was preparing to enforce when our war with her commenced. Suppose the Supreme Court should sustain these pretensions: what then would become of the cause? But suppose all these difficulties overcome: how would you enforce the decree? The question is not one about property, for there is not a foot of public land in New Mexico which is capable of individual enjoyment: it has all been appropriated more than a hundred years ago. The controversy is one about political jurisdiction. In such a case, how is the decree to be enforced? Are the Texan courts and their officers to be driven out of the territory? If attempted by force, it would be civil war.

I know I shall be told that the Supreme Court has taken jurisdiction of questions of boundary between States; but in those cases the parties voluntarily appeared, and the court acted very much as arbitrators, selected by the parties, to whose judgment they would, in good faith, be bound to submit. But the question will be a very different one whenever a State refuses to appear or to recognise its authority.

There is one case in which the Supreme Court could decide incidentally a question of boundary between States; that is, between persons claiming the same land under grants of different States. It was supposed that many cases of that sort would arise in the disputed territory in the several instances referred to in the early part of my argument. But such a case would be one involving merely individual rights, and between parties who could be reached by the process of the courts, and be bound by its power. If the power claimed for the court, which I have been considering, be valid, then this provision would have been unnecessary. But there are no useless provisions in the constitution. It seems to me that there can be no one familiar with the history of our constitution who will believe that the States, in ratifying it, ever contemplated the submission to the Supreme Court of questions involving the *corpus* of their sovereignty. If the Supreme Court can deprive a State of a part of the territory it claims, it may, as far as the question of power is concerned, deprive it of all, and thus annihilate it. Could such a thing ever have been contemplated? You avoid all difficulty, if you limit its jurisdiction to controversies affecting merely questions of property, and not its sovereign rights, and especially not such as involve its very existence.

In denying to the Supreme Court jurisdiction in the case we are discussing, I am but carrying out the views, solemnly expressed, of my own wise and patriotic State, on a memorable occasion. She had a question of disputed boundary with Maryland. That State threatened to bring the case before the Supreme Court. Virginia, under the lead of that great statesman and jurist, Littleton W. Tazewell, declared her unalterable purpose not to submit a question involving the extent of her sovereign limits to any tribunal not of her own selection. Jefferson, John Taylor, Roane, and their compeers, in a more questionable case, utterly denied the jurisdiction of the Supreme Court, and repudiated and denounced its decision. I allude to their denunciation of the opinion of the court in the case of

Cohen *vs.* the State of Virginia. And we are told in the Life of John Hancock, written by the elder Adams, contained in Sanderson's series, that the former, "in favoring a confederate republic, did not vindicate with less scrupulousness the dignity of the individual States; and that, in a suit brought against the State of Massachusetts in the court of the United States, in which he was summoned as goverrnor to answer the prosecution, he *resisted* the process, and maintained inviolate the *sovereignty* of the commonwealth."

If the effort shall be made to drag Texas before the Supreme Court, I hope her governor will profit by the example of John Hancock, and vindicate the dignity, and preserve inviolate the sovereignty, of his commonwealth.

But I may be asked, if the Supreme Court has not jurisdiction in such a case, where is a final arbiter to be found? I reply emphatically, Nowhere. The constitution provides none, nor did it design to provide any. Our constitution is a compact between sovereign States, who have reserved to themselves respectively all such questions. They are to be adjusted by negotiation, mediation, arbitration, and the other resources which are almost infinite, of amicable adjustment; and beyond this no remedy is provided, and it is scarcely possible any can be necessary. They are to be settled as they were in the case between Virginia and Maryland, not to mention many others.

There are other provisions of the constitution which must be violated before New Mexico can be brought into this Union as a State.

The constitution declares that no person shall be a representative who shall not have attained the age of twenty-five, nor a senator who shall not have attained the age of thirty, and been, in the case of a representative, seven years, and in the case of a senator nine years, a citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen. Now, sir, how is this requisition of the constitution to be complied with? How many persons are there in New Mexico qualified for representatives and senators? I see my friend from New York [Mr. DUER] smiles. He doubtless recollects that this objection was urged in the case of the admission of Texas, and, probably, that I answered it on this floor. But I will show him they are not analogous. There were in Texas at the time of her admission at least one hundred thousand persons who were native American citizens. It was true they had expatriated themselves, and were at that time citizens of Texas. I showed, however, by the law of nations, as recognised by our own courts, that the moment they were brought again under our jurisdiction they became restored to their original rights and privileges. They became at once, in the language of jurists, *redintegrate* citizens. But there are not one thousand American citizens in New Mexico. The most authentic accounts do not make the number greater than five hundred, and no account makes them more than twelve hundred. For the argument, let us suppose that there are that number. Nearly one-half of them are females; more than half of the remainder are under the ages of twenty-five and thirty. So that the range within which to select a representative and two senators would be confined (supposing there are twelve hundred Americans there) to about three hundred persons. The truth is, it would be confined within narrower limits. Of the sort of people of whom this number is composed, this House is pretty well informed It is certain they are not such as would be likely to be elected senators and

representatives in the old States, or they would not be in New Mexico. Will anybody seriously contend that to give a representative on this floor and two senators to such a number of persons would not be an outrage upon the spirit of our institutions? Will anybody say that such a people should have in the Senate an equal vote with New York, Virginia, and the other States, in deciding upon the great interests of this nation?

I have shown the narrow range in which the selection of representatives and senators would be confined. Let us now see what sort of people would be the electors. Upon this point I prefer to draw upon Mr. Webster. I can say nothing which will carry with it the same weight of authority, or which is so graphic. In a speech which he delivered in the Senate in March, 1848, he thus describes the people of New Mexico:

"New Mexico is secluded, isolated—a place by itself—in the middle of the mountains—five hundred miles, I believe, from Texas.

"Mr. RUSK Five hundred miles from the settled portions of Texas.

"Mr. WEBSTER. Further from anywhere else! It does not belong anywhere. It has no belongings about it. Sir, at this moment, it is absolutely more retired, and shut out from communication with the civilized world, than the Sandwich islands, or most of the islands in the Pacific ocean. It presses hard on Typee, and the people are infinitely less elevated in mind and condition than the people of the Sandwich islands—far less worthy of our association, far less fit to send their senators here, than are the inhabitants of the Sandwich islands—far less worthy are they than the better classes of Indians in our neighborhood. Commend me to the Cherokees, the Choctaws—if you please, to speak of the Pawnees, the Blackfeet, and the Snake Indians, and the Flatheads—anything except the ——— Indians, and I am satisfied with them, instead of the people of New Mexico. *They have no notion of our institutions, or of any free institutions. They any notion of popular government! Why, not the slightest—not the slightest on earth. And the question is asked, what will be their constitution? It is farcical to talk of such a people making a constitution. They do not know the meaning of the term. They do not know its import; they know nothing at all about it.* AND I CAN TELL YOU, SIR, THAT WHEN WE HAVE MADE IT A TERRITORY, AND WISH TO MAKE IT A STATE, SUCH A CONSTITUTION AS THE EXECUTIVE POWER OF THIS GOVERNMENT THINKS FIT TO SEND TO THEM WILL BE SENT AND ADOPTED. THE CONSTITUTION OF OUR FELLOW-CITIZENS OF NEW MEXICO WILL BE FRAMED IN THE CITY OF WASHINGTON. Now, what says Colonel Hardin in regard to New Mexico—that most lamented and distinguished officer, whom I well knew as a member of the other House, and whose death I did most deeply deplore? He gives a description of New Mexico, and speaks of the people of that country in these terms:

"'The people are on a par with their land. One in two hundred or five hundred is rich, and lives like a nabob; the rest are peons, or servants sold for debt, who work for their masters, and are as subservient as the slaves of the South, and look like Indians, and, indeed, are not more capable of self-government. One man, Jacobus Sanchez, owns three-fourths of all the land our column has passed over in Mexico. We are told we have seen the best part of northern Mexico; if so, the whole of it is not worth much.'

"I need not read the whole extract. He speaks of all northern Mexico, and New Mexico is not the better of it. Sir, there is a recent traveller, who is not unfriendly to the United States, if I may judge from his works, for he commends us everywhere. He is an Englishman, and his name is Ruxton. I believe his work is in the library, and I suppose that gentlemen have read it. He gives an account of the morals and manners of the people; and, Mr. President and senators, I will take leave to introduce you to these, your soon-to-be respected fellow-citizens of New Mexico:

"'It is remarkable, that, although existing from the earliest times of the colonization of New Mexico, a period of two centuries, in a state of continual hostility with the numerous savage tribes of Indians who surrounded their territory, and in constant insecurity of life and property from their attacks; being also far removed from the enervating influences of large cities, and, in their isolated situation, entirely dependent on their own resources—the inhabitants are totally destitute of those qualities which, for the above reasons, we might naturally have expected to distinguish them, and are as deficient in energy of character and physical courage as they are in all the moral and intellectual qualities. In their social state, but one degree removed from the veriest savages, they might take lessons even from these in morality and the conventional decencies of life. Imposing no restraint on their passions, a shameless and universal concubinage exists, and a total disregard of moral law, to which it would be impossible to find a parallel in any country calling itself civilized. A want of honorable principle, and consummate duplicity and treachery, characterize all their dealings. Liars by nature, they are treacherous and faithless to their friends, cowardly and cringing to their enemies: cruel, as all cowards are, they unite savage ferocity with their want of animal courage; as an example of which, their recent massacre of Governor Bent and other Americans may be given—one of a hundred instances.'

"'One out of a hundred instances;' and these are soon to be our beloved countrymen!"

How prophetic these remarks! How precisely has the result fulfilled the prediction! Such a people have no notion of free government. As Mr. Webster predicted, their constitution has been framed in the city of Washington; and they have adopted just such a constitution as the Executive saw fit to send them.

New Mexico will not be in a condition to come into this Union in twenty years, if she ever will be. New Mexico was settled prior to 1590—several years before the settlement of Jamestown. Its population is not so great now as it was a hundred years ago. Gregg (a most reliable authority) says, in his Commerce of the Prairies, published last year: "If we exclude the unsubjugated savages, the entire population of New Mexico, including the Pueblo Indians, cannot be set down, according to the best estimates I have been able to obtain, at more than 70,000 souls. These are divided as follows: White Creoles, say 1,000; Mestizoes, or Mixed Creoles, 59,000; and Pueblo Indians, 10,000. Of naturalized citizens the number is inconsiderable—scarcely twenty; and if we except transient traders, there are not over double as many alien residents." Gregg is of opinion that New Mexico can never sustain a much larger population than this. He says that "the necessity of irrigation has confined, and no doubt will continue to confine, agriculture principally to the valleys of the constant flowing streams. In some places the crops are frequently cut short by the drying up of the streams." All of the land susceptible of cultivation is now in cultivation. It is true, their agriculture is very rude; and no doubt American enterprise would increase its product. But the New Mexicans live upon very little—less than half of what our people require; and consequently consumption will increase, as our people go there, faster than production.

I am anxious to organize a territorial government for New Mexico, and to keep her in a territorial condition until the time arrives, if it ever shall, when she will be in a condition to come into the Union. A territorial government was what the people themselves declared in favor of, and asked of us to extend to them, until the interference of the Executive induced them to form a State constitution. But, sir, I never will agree to admit her as a State until the character and number of her population will authorize it.